YUKON RECOVERY, L.L.C., Plaintiff-Appellant,
v.
CERTAIN ABANDONED PROPERTY, in rem, Defendant,
Ocean Mar, Inc., Claimant-Appellee.

No. 98-36015.
United States Court of Appeals,
Ninth Circuit.
Argued and Submitted Dec. 6, 1999.
Filed March 7, 2000.

Appeal from the United States District Court for the District of Alaska; H. Russel Holland, Chief Judge, Presiding.
D.C. Nos. CV-96-00270-HRH, CV-96- 00304-HRH.

Before: REAVLEY,* REINHARDT and McKEOWN, Circuit Judges.

REAVLEY, Circuit Judge:

This is a contest for salvage rights to gold cargo in a shipwreck lying for a century on the bottom of the inland passage near Juneau. Yukon Recovery, L.L.C. (Yukon) appeals the judgment in favor of Ocean Mar, Inc. (Ocean Mar) granting rights to salvage the SS Islander. Yukon asserts that the district court applied the wrong standard of proof, erred in its ruling on abandonment, and erred in granting exclusive salvage rights to Ocean Mar. We affirm.

* The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

HISTORY OF THE CASE

The following facts are undisputed. The Islander sank in 1901 near Juneau en route from Skagway, Alaska to Vancouver, British Columbia. The Islander routinely carried Royal Canadian mail along with cargo and passengers. Many attempts to salvage the Islander were unsuccessful because the technology required to conduct salvage operations at that depth and water temperature did not exist at that time. Despite the lack of technological sophistication, an ingenious salvage effort by the salvage company called the Curtis/Wiley Group raised approximately two-thirds of the hull in 1934; however, 60 feet of the forward section had broken from the vessel and remained on the ocean floor. Ocean Mar determined the location of the wreck during expeditions to the site in 1993 and 1994 and executed a salvage contract in 1995 with Marine Insurance Company ("MIC") for salvage of any gold insured by MIC recovered from the site. In 1996 Yukon mounted an expedition to the site of the wreck and recovered a 1930's whiskey bottle and a light fixture from the area.

Yukon filed an in rem action seeking arrest of the artifacts, title to vessel and cargo at the wreckage site, exclusive rights as salvor of the wreckage site and injunctive relief against competing salvors. Ocean Mar, having obtained its salvage contract from MIC, was en route to conduct salvage activities at the site in 1996 when it was notified of a temporary restraining order obtained by Yukon. Ocean Mar appeared in the action brought by Yukon and filed a separate action seeking exclusive salvage rights. After consolidation of the cases, the district court held a bench trial on the merits, and entered findings of fact and conclusions of law.

The district court found the following facts by a preponderance of the evidence. The Islander sank with a large shipment of gold owned by the Canadian Bank of Commerce (CBC) sent by registered mail. MIC insured the gold and paid a claim entitling MIC to subrogation rights in the gold. The gold shipment was contained in a forward section of the vessel and therefore remained on the ocean floor after the 1934 salvage. Theodore Jaynes, the owner of Ocean Mar, carried out extensive research into the Islander and her cargo starting in 1989. Robert Mester, the owner of Yukon, conducted far less primary research and gathered information largely from other researchers. Mester acquired portions of Ocean Mar's proprietary funding proposal, which increased the urgency of his efforts to mount a competing salvage effort. Ocean Mar has all the financial and professional resources required to salvage the remaining cargo of the Islander. Neither Yukon nor Ocean Mar has obtained or retained actual, continuous and exclusive possession or occupancy of the wreckage site of the Islander or the surface of the water above the site.

The district court concluded that Ocean Mar was the first in modern times to find, observe, record and make a timely claim for the wreckage of the Islander. Arrest of the light fixture did not entitle Yukon to any priority over a contract salvor. Because competition would endanger lives, equipment, and artifacts, it is unsafe and technically unfeasible for two salvors to simultaneously work the wreckage site. Because it conducted thorough historical investigation and was the first in recent times to locate the wreckage of the Islander, Ocean Mar is entitled to exclusive salvage rights, even absent actual possession or physical presence at the site. The district court concluded that MIC has not abandoned its rights in the gold and Ocean Mar is entitled to perform its salvage contract for the

gold cargo owned by MIC.

The district court dismissed Yukon's petition, granted Ocean Mar exclusive rights to salvage the Islander, and enjoined Yukon from exploring or conducting salvage operations at the Islander site. The district court ordered Ocean Mar to submit a salvage plan, keep detailed records of all property raised at the wreckage site and sequester all gold and other property raised for the determination of ownership rights under the court's continuing jurisdiction over the case.

POINTS OF APPEAL[1]

Yukon asserts that the district court should have applied a clear and convincing standard of proof to the determination of MIC's rights in the cargo, and that the evidence conclusively establishes that MIC abandoned any interest it held in the cargo. Yukon further argues that its in rem arrest of artifacts from the wreck site requires the district court to grant it exclusive rights as salvor in possession. Alternatively, Yukon asserts that the district court should have granted it access to the wreck as co-salvor.

[1] Yukon has filed a motion to strike Ocean Mar's brief on the grounds of lapse of corporate status for failure to pay Delaware franchise taxes. Ocean Mar responds with a request to take judicial notice of its reinstatement. The capacity of a corporation to sue and be sued is determined according to the laws of the jurisdiction where the corporation is organized. Fed.R.Civ.P. 17(b). Delaware law provides an automatic three year extension of corporate existence for the purpose of prosecuting or defending any lawsuit begun prior to or within three years after corporate dissolution. See City Investing Co. Liquidating Trust v. Continental Cas. Co., 624 A.2d 1191, 1195 (Del.1993) (citing 8 Del. C. § 278). The motion to strike is denied.

PROOF OF MIC'S OWNERSHIP

The district court held that, absent abandonment, MIC is the owner of the Islander's gold. It reached this conclusion by finding that MIC had insured the gold and paid the insurance claim, entitling it to subrogation rights in the gold. Yukon argues that the district court's finding of fact is clearly erroneous because the court evaluated the evidence under the wrong burden of proof.

We reject Yukon's challenge to the burden of proof employed by the district court, because both Yukon and Ocean Mar agreed below that the question of the ownership of the gold was governed by the standard the district court employed. Before the district court, Yukon sought a finding of fact on this issue under the preponderance-of-the-evidence standard. On appeal, however, Yukon for the first time asserts that MIC's subrogation rights must be proved by clear and convincing evidence. Yukon argues that the law of Alaska requires clear and convincing evidence in the absence of documentary proof of an insurance policy and payment of a claim. Alternatively, Yukon also argues that it is entitled to invoke the English law of marine insurance which requires proof by a heightened evidentiary standard. We need not address Yukon's arguments regarding choice of law, however, because it may not now argue against the preponderance-of-the-evidence standard that it asked the district court to apply at trial. If the district court erred (and we do not suggest that it did), the error was invited.

Putting aside its untimely argument, Yukon has not challenged the sufficiency of the evidence to support the district court's subrogation finding under the standard of proof applied at trial. Review of the record demonstrates that there is

sufficient evidence to support the district court's finding as to MIC's subrogation rights in the Islander cargo under the preponderance-of-the-evidence standard, and that the finding is not clearly erroneous.

PROOF OF ABANDONMENT[2]

Yukon argues that two pieces of evidence conclusively demonstrate that MIC abandoned any interest it may have in the cargo of the Islander. Yukon argues that MIC's failure to file a claim in the 1901 admiralty limitation of liability proceeding brought by Canadian Pacific Navigation Company conclusively establishes that MIC abandoned its interest in the cargo. The district court found that it was not unusual that MIC declined to file a claim, which was supported by testimony from an expert witness on insurance practices. This conclusion is not unreasonable given that the limitation fund included only the value of the Islander's lifeboats and a small amount of freight due on the voyage. The only preclusive effect of failure to file a claim in the limitation proceeding is that it bars recovery from CPNC, which is not the equivalent of abandonment of title to lost property.

Neither of these parties claim any connection with the 1934 salvage operation by Curtis/Wiley, but Yukon claims that

[2] Admiralty salvage cases occasionally employ the term "abandonment" for two distinct meanings. One meaning is the same as "derelict" which refers to circumstances where the master or owner is no longer in physical possession of the vessel. Title to a derelict vessel is held by the owner unless its title has been "abandoned" according to the second meaning of this term, which renders the vessel subject to the law of finds rather than salvage. For the sake of clarity, the term "abandonment" is used here only to refer to property in which title has been abandoned.

this operation conclusively establishes MIC's abandonment of any claim to the cargo. First, Yukon argues that because the salvage was partially successful, the district court erred in ruling that the technology to salvage the Islander did not exist until very recently. Because the district court relied on the lack of technology as a factor in its determination that MIC's inaction did not constitute abandonment, Yukon argues that the 1934 salvage proves that the district court should not have relied on the absence of technology as a factor.

The 1934 salvage effort failed to bring up the section of the ship containing the mail gold storage hold because the bow of the ship had broken free from the remainder of the hull. There is nothing to suggest that the extremely primitive, although ingenious, technology utilized in the 1934 salvage was a viable method for recovering the forward section of the Islander; therefore the failure to attempt a second salvage with the same technology does not constitute evidence of abandonment of the cargo in the forward holds. Both Yukon and Ocean Mar used the most modern sonar and remote diving technology to locate and explore the remaining wreckage field and Yukon cannot reasonably contend that the same results could have been accomplished with the technology available in the 1930's. It is only by virtue of modern technological advances that the current salvage attempt is within the realm of possibility. The district court properly acknowledged that lack of technology is one factor to consider in determining whether inaction constitutes abandonment. See Deep Sea Research, Inc. v. The Brother Jonathan.[3]

[3] 102 F.3d 379, 388 (9th Cir.1996) (Aff'd in part, vacated in part California v. Deep Sea Research, 523 U.S. 491, 118 S.Ct. 1464, 140 L.Ed.2d

(continued...)

Yukon proceeds with an entirely different tack to argue that failure to object to the 1934 salvage is direct evidence of abandonment because MIC should have asserted its rights during the commencement of the salvage. The problem with this argument is that MIC was not required to object to the 1934 salvage in order to preserve its claim to the cargo. Salvage law grants the salvor only a superior right of possession to recovered property, and not title, until a court has passed on title and a salvage award. See Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel (Treasure Salvors III)[4]; Hener v. United States.[5] The 1934 salvor failed to raise the mail gold, and title to the gold was not then at issue.

The district court heard substantial testimony, reviewed copious exhibits, and determined from all the facts and circumstances that MIC had not abandoned its rights in the gold. Neither the limitation proceeding nor the 1934 salvage constitute conclusive evidence to the contrary. The district court applied a preponderance of the evidence standard to the question of abandonment, and the sufficiency of the evidence to support the district court's determination has not been directly challenged in this appeal.

EXCLUSIVE SALVAGE RIGHTS

Yukon contends that the district court erred in granting

[3](...continued)
626 (1998)).

[4] 640 F.2d 560, 567 (5th Cir.1981).

[5] 525 F.Supp. 350, 357 (S.D.N.Y.1981).

exclusive salvage rights to Ocean Mar and not to Yukon. Yukon argues that the Islander is abandoned property and therefore the salvage contract between Ocean Mar and MIC is ineffective to confer priority on Ocean Mar. Yukon further argues that it is entitled to priority because it was the first to file an in rem proceeding and present artifacts from the wreck site for arrest. Because the presentation of artifacts is merely a jurisdictional mechanism, Yukon is mistaken in its assertion that being first to arrive at the courthouse confers priority rights as a salvor.

The premise of Yukon's first argument is untenable because the district court's finding regarding abandonment is undisturbed on appeal. Even if the premise were correct and the cargo had been abandoned, Yukon's claim to priority does not flow automatically by virtue of its filing for in rem arrest. Filing an in rem arrest of recovered items merely confers in rem jurisdiction in the district court over the recovered property. See Martha's Vineyard Scuba Headquarters, Inc. v. The Unidentified, Wrecked and Abandoned Steam Vessel.[6] Filing an in rem petition for arrest of artifacts does not automatically confer exclusive rights to a site as salvor in possession. See MDM Salvage, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel;[7] See also Indian River Recovery Co. v. The China;[8] Marex Titanic, Inc. v. Wrecked and Abandoned Vessel,

[6] 833 F.2d 1059, 1062 (1st Cir.1987).

[7] 631 F.Supp. 308, 312 (S.D.Fla.1986).

[8] 645 F.Supp. 141 (D.Del.1986) (first to file in rem complaint enjoined from salvage activities).

RMS TITANIC.[9] Because an in rem complaint and admiralty arrest of recovered artifacts merely confer jurisdiction in the district court, and do not automatically create exclusive salvage rights, Yukon's basis for claiming salvor in possession status fails.

Yukon further challenges the award of exclusive salvage rights to Ocean Mar. Courts frequently use actual or constructive possession of the wreck site as grounds for a grant of exclusive salvage rights. See Treasure Salvors III, 640 F.2d at 572; Hener, 525 F.Supp. at 357; Cobb Coin Co., Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel.[10] To maintain an exclusive franchise, the salvor must undertake ongoing salvage operations with due diligence which are clothed with some prospect of success. Martha's Vineyard, 833 F.2d at 1061. The district court found that Ocean Mar had all the resources necessary to successfully salvage the remaining cargo of the Islander; however, because the district court found that neither Yukon nor Ocean Mar had obtained actual, continuous and exclusive possession or occupancy of the wreckage site of the Islander or the surface of the water above the site, possession cannot be utilized to determine exclusive salvage rights.

The failure of the parties to engage in ongoing salvage operations is understandable in light of the changes in salvage

[9] 805 F.Supp. 375, 377 (E.D.Va.1992) (exclusive salvage claims between first to file and intervenor requires trial on the merits.) (rev'd on other grounds, 2 F.3d 544 (4th Cir.1993)).

[10] 525 F.Supp. 186, 195 (S.D.Fla.1981).

law wrought by the Abandoned Shipwreck Act (ASA).[11] Apart from this change, salvage law encourages salvors to undertake risks to rescue imperiled maritime property through generous salvage awards by admiralty courts. Treasure Salvors III, 640 F.2d at 567. The expenditures required to establish constructive possession and ongoing salvage operations for sunken ships were justified by the prospect of a grant of exclusive salvage rights and a liberal award from any salvaged property. Therefore courts could expect that salvors would establish occupancy and engage in ongoing salvage prior to the institution of legal proceedings.

Under the ASA, however, salvors seeking to raise long lost wrecks in state waters can no longer engage in ongoing salvage operations with confident expectations of a liberal salvage award to compensate them for the investment. Under the ASA, the United States asserts title to all abandoned shipwrecks that are embedded in the submerged lands of a state, embedded in the coralline formations protected by a state on submerged lands of a state, or on submerged lands of a state and either included or eligible for inclusion in the national register.[12] The ASA transfers title in all such shipwrecks to the state in or on the land of which the shipwreck is located.[13] The laws of salvage and finds do not apply to shipwrecks subject to § 2105 of the

[11] 43 U.S.C. § 2101, et seq.

[12] 43 U.S.C. § 2105(a).

[13] 43 U.S.C. § 2105(d).

ASA.[14]

The ASA creates uncertainty when a salvor cannot determine in advance whether a wreck is "abandoned" or "embedded" and therefore subject to the ASA and questions of fact to be decided by the court. A salvor could expend immense resources to locate, survey and salvage a wreck only to have the court later rule that the salvor is entitled to nothing because the ASA displaces the law of salvage. Both of the parties to this litigation have expended significant resources to locate the Islander but prudently avoided costly salvage operations which could have resulted in a total loss under the ASA. Because neither party established occupancy and ongoing salvage operations, we must look to other factors for the determination of exclusive salvage rights.

The grant of exclusive salvage rights is subject to equitable considerations. See Treasure Salvors III, 640 F.2d at 573 ("equitable considerations come into play in determining the legal protection afforded a finder."); Hener, 525 F.Supp. at 358 (admiralty courts may be flexible in determining whether a salvor has commenced an operation worthy of protection.); See also R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel.[15] In addition to occupancy and prospects of success, courts have looked to a variety of other equitable factors to analyze competing salvage claims. For example, courts consider whether the salvor has conducted independent historical research on the vessel and has acted in good faith. See Deep Sea

[14] 43 U.S.C. § 2106(a).

[15] 924 F.Supp. 714, 720 (E.D.Va.1996).

Research, Inc. v. The Brother Jonathan.[16] Courts also grant exclusive rights to the first finder over subsequent finders.[17] See Martha's Vineyard, 833 F.2d at 1065; The China, 645 F.Supp. at 144; Deep Sea Research, 883 F.Supp. at 1361 (first finder of lost wreck may acquire exclusive rights to salvage).

The district court made several specific findings that support its decision to grant Ocean Mar exclusive salvage rights. The district court found that Ocean Mar was the first in modern times to find and claim the wreckage of the Islander. The district court also found that Ocean Mar's research into the history of the Islander was by far more thorough than Yukon's. The district court also found that Yukon's acquisition of Ocean Mar's proprietary information concerning the estimated value of the gold cargo influenced Yukon's attempt to mount a competing salvage operation. All of these findings are supported by evidence in the record and support the district court's decision to award exclusive salvage rights to Ocean Mar.

The district court also concluded that Ocean Mar was entitled to priority by virtue of its status as a contract salvor. Yukon contends that the district court erred in conferring priority on the basis of contract salvor status. We find little direct authority on this point; however, the precedents that exist suggest that a contract salvor may be granted priority over a

[16] 883 F.Supp. 1343, 1362 (N.D.Cal.1995).

[17] The term "Finder" as used in salvage cases does not necessarily mean that title to the vessel is abandoned and therefore subject to the law of finds. The exclusive rights to salvage a vessel may be awarded to the first to discover the location of a lost ship wreck even if the title to the wreck is still vested in the original owner.

volunteer salvor. See Vol. 3A, M. Norris Benedict On Admiralty: The Law of Salvage, §152 (7th Ed. rev.1997); See Quantity of Iron.[18] We also note authority for the proposition that an owner may reject salvage by a volunteer. See Platoro Ltd., Inc. v. Unidentified Remains Of A Vessel.[19] It is reasonable that the law should support the right of an owner to select a salvor for shipwrecked property rather than be subjected to a salvage award granted to a volunteer. The district court properly granted priority to Ocean Mar by virtue of its equitable claim as first finder and its salvage contract.

CO-SALVOR STATUS

Yukon argues that the district court should have granted it rights as co-salvor of the Islander. As indicated above, the first finder is entitled to exclusive salvage rights so long as it engages in diligent efforts clothed in some prospect of successful salvage. Ocean Mar, as first finder, is entitled to this protection and Yukon has not presented any compelling reason for departing from the rule. In addition, the district court specifically found that co-salvage would endanger lives, valuable equipment, and artifacts from the site because it would create competition to recover the gold cargo. The district did not err in refusing Yukon's request for co-salvor status.

AFFIRMED.

[18] 20 F. Cas. 120 (D.Mass.1862).

[19] 695 F.2d 893, 901 (5th Cir.1983).

YUKON RECOVERY, L.L.C., Plaintiff,

v.

CERTAIN ABONDONED PROPERTY, in rem, Defendant.

OCEAN MAR, INC., Plaintiff,

v.

THE CARGO OF THE SS ISLANDER, Defendant.

Nos. A96-0270-CV (HRH), A96-0304-CV (HRH).
United States District Court, D. Alaska.
Aug. 28, 1998.

JUDGMENT IN A CIVIL CASE

HOLLAND, J.

X DECISION BY COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

THAT plaintiff's complaint is dismissed with prejudice and judgment is hereby entered in favor of Ocean Mar Inc. Marine Insurance Company is the true and lawful owner of Canadian Bank of Commerce cargo lost in the sinking of the SS Islander, and Ocean Mar is the duly authorized contract salvor of Marine Insurance Company. Yukon Recovery, LLC, its agents, servants, employees, and all others acting in concert with them, are enjoined from taking any further action with respect to exploring or conducting salvage operations at the site of the sinking of the SS Islander, and from interfering in any way with the salvage

operations at that site to be undertaken by Ocean Mar Inc.

FINDINGS OF FACT & CONCLUSIONS OF LAW

This case was tried to the court without a jury commencing on July 13, 1997. Based upon the parties' statement of uncontested facts and upon the testimony and exhibits received at trial. The court herewith makes its findings of fact and conclusions of law.

FINDINGS OF FACT

(1) In 1897, news that gold had been discovered in the Klondike River and its tributaries in what is now the Yukon Territory of Canada reached the settled parts of North America. A great rush of people descended upon the Klondike River and resulted in the development of the city of Dawson, Yukon Territory, at the confluence of the Yukon and Klondike Rivers. In 1898 and thereafter, huge quantities of placer gold were extracted in the area. Much of the gold was brought to Dawson where raw gold served as the medium for exchange until banking institutions were set up in that city.

(2) By the late summer of 1898, both the British Bank of North America and the Canadian Bank of Commerce had opened branches in Dawson. Both banks set about purchasing huge quantities of raw gold at a price of $16 per ounce less the bank's cost of transporting the gold to a smelter and refiner and the cost of insurance. The banks exchanged their privately issued notes for the gold, and by 1901 bank notes rather than raw gold were by and large the medium of exchange in Dawson. By 1901, very substantial portions of the gold production were converted to notes by the banks, which stored the gold in vaults until it could

be shipped to smelters located in the Pacific Northwest.

(3) By 1901, companies owned or controlled by the Hudson Bay Company had set up steamship service during the summers between Dawson and Whitehorse, Yukon Territory, and railroad service between Whitehorse and the tidewater port of Skagway in the Territory of Alaska. In addition, the Hudson Bay Company, through the Canadian Pacific Railway, had acquired and was operating the Canadian Pacific Navigation Company, which provided steamer service between Skagway and Vancouver, British Columbia.

(4) During the summer of 1901, the Canadian Pacific Navigation Company operated the steamship SS Islander between the ports of Skagway, Alaska, and Vancouver, British Columbia. The SS Islander was built in Glasgow, Scotland, in 1888 for the Canadian Pacific Navigation Company. She was a steel-hulled, twin screw, passenger vessel, powered by a triple expansion steam engine capable of producing 15 knots. The SS Islander was 240 feet long; her beam was 42 feet. Although a passenger liner, she was capable of carrying limited cargo such as mail, including registered mail.

(5) The SS Islander departed Skagway on August 14, 1901. The court finds[1] that when the SS Islander departed Skagway, it was

[1] When the court uses the expression "the court finds", and even where that rubric is not employed, the court means to convey the notion that, having considered all of the evidence, the court is convinced that the party having the burden of proof (the affirmative) of a fact issue has convinced the court that such fact is more likely true than not true--the standard preponderance of the evidence evaluation. Also, the court means to imply that it has made all reasonable inferences which may be drawn from facts

(continued...)

carrying a large shipment of gold owned by the Canadian Bank of Commerce, destined for delivery to smelters and refiners in the Pacific Northwest. While it is clear that there were river steamers operating between Dawson City and Whitehorse, Yukon Territory, and that a railroad operated between Whitehorse and Skagway, Alaska, there is scant evidence (no bills of lading or other records) as to how the SS Islander shipment in question actually moved between Dawson City and Skagway, Alaska. Based upon the evidence which has been produced, the court finds that the Canadian Bank of Commerce of Dawson, Yukon Territory, more probably than not made a large shipment of gold in August of 1901 which was in the custody of the Northwest Mounted Police as registered mail matter from their departure from Dawson, Yukon Territory, until the sinking of the SS Islander on August 15, 1901. The evidence is clear that steel-banded, wooden boxes, such as those known to have been used by the Canadian Bank of Commerce to ship gold bricks reached Skagway and were seen on the docks on or about August 14, 1901, and were subsequently loaded upon the SS Islander. The shipment was accompanied by three Northwest Mounted Police Officers in accordance with an agreement between the Canadian Bank of Commerce and the Canadian Government.[2]

[1](...continued)
which have been proved by a preponderance of the evidence.

[2] As with other matters here at issue, the records of the agreement by which the Canadian Bank of Commerce acted as royalty collector for the Canadian government are incomplete. The court finds there was an agreement by which the Canadian Bank of Commerce paid the Canadian government for royalty gold, and the government provided Northwest Mounted Police guards for gold shipments.

(6) The SS Islander proceeded to Juneau, Alaska. The SS Islander departed Juneau late on August 14 or early August 15, 1901, proceeding south down the Gastineau Channel. At approximately 2:00 a.m. on August 15, 1901, at a point near the confluence of the Gastineau Channel, Stephens Passage, and Taku Inlet, the SS Islander struck a submerged object[3] and sunk, bow first, in some 365 feet of water.

(7) The Canadian Pacific Navigation Company instituted limitation of liability proceedings in the district court in Seattle, Washington. The limitation of liability proceedings make no mention of any claim on behalf of the Canadian banks doing business in Dawson, Yukon Territory, or their insurers. The court finds that it would not be unusual for cargo insurers to leave it to other interested parties to establish the right to proceed against the vessel owner. Ultimately the owners were granted limitation of liability, and the claimants were left to divide up the minimal value of lifeboats from the SS Islander which were the only salvage then available.

(8) Shortly after the sinking, there was publicity of possible efforts to raise the SS Islander. The court finds that these efforts were undertaken on behalf of the underwriters who insured the

[3] There has long been uncertainty and disagreement as to the cause of the collision which resulted in the sinking of the SS Islander. The official investigation of the incident appears to have concluded that the vessel collided with a large iceberg, possibly calved off the Taku Glacier. Others suspect that the pilot and captain of the SS Islander were intoxicated at the time of the collision, and that the vessel was holed by a submerged rock or ledge which did not strand the vessel. The cause of the sinking is no longer of any import.

gold shipment, not the hull of the vessel.[4] The early efforts at salvaging the SS Islander were unsuccessful. She had sunk in water too deep for equipment available at the turn of the century.

(9) However, efforts continued periodically, and salvors, apparently having no connection with any insurer, undertook to and did successfully raise the SS Islander in 1934. Perhaps because of the damage caused in the collision, perhaps because the vessel sunk bow first, and perhaps because of the placement of cables used to raise the hull of the SS Islander, or all of the foregoing, the entire hull of the vessel was not recovered. A 60-foot bow section of the vessel was left behind in 1934. The bank shipment of gold carried by the SS Islander was more probably than not placed in one or more storerooms in the forward section of the vessel which was not recovered in 1934.

(10) Although there is a dearth of business records with respect to insurance of the gold on the SS Islander on August 14, 1901, the court finds that more probably than not the Canadian Bank of Commerce insured the gold shipped on the SS Islander. Canadian postal authorities did not have in place insurance covering registered mail on the SS Islander on August 14, 1901.

[4] A contemporaneous newspaper article reported that deep sea diver Dick Meyer "has been engaged by the English Marine Insurance Company to go to Juneau in August and go down to the boat and explore her position." Ocean Mar's Exhibit G. In light of the fact that the insured value of the gold shipped on the SS Islander more probably than not far exceeded the $75,000.00 for which the hull of the SS Islander was insured (several million dollars of gold versus $75,000.00 hull insurance), the Marine Insurance Company (see Paragraph (11), infra), as insurer of registered mail, would have a far greater interest in pursuing salvage, even at great depths, than would the hull insurer.

(11) More probably than not, the Canadian Bank of Commerce obtained "open cover"[5] insurance for its gold shipments. Contemporaneous bank records, including in particular records of negotiations between the Canadian Bank of Commerce and the Canadian government, as well as the written history of the Canadian Bank of Commerce, all reflect that it was the practice of the Canadian Bank of Commerce to insure its gold shipments out of the Yukon Territory. Conservative institutions that they are (and no doubt were), a bank would more probably than not insure the actual cash value of the gold. Having insured the gold, it is highly improbable that the Canadian Bank of Commerce would not have made a claim, or that it would have quietly failed to recover on that claim. The fact that hull claims were paid strongly suggests that cargo claims in connection with the loss of the SS Islander would also have been paid by British insurers. Also, the Canadian Bank of Commerce was dealing with the Marine Insurance Company as to other insurance matters in 1903, which suggests a continuing satisfactory business relationship between them.

(12) The court finds that the Marine Insurance Company, now a subsidiary of the Royal Sun Alliance Group of insurance companies, more probably than not insured the Canadian Bank of Commerce registered mail shipment of gold on the SS Islander on August 14, 1901, and more probably than not paid the then full cash value of the loss. The Marine Insurance Company was authorized to sell insurance for registered mail sent between points in Canada. The court finds that the Marine

[5] A form of insurance for regular shipments which Marine Insurance's Mr. Matthews described as an annual rolling contract of insurance which took the place of discrete polices of insurance for each shipment.

Insurance Company at the time at issue was by and large a cargo insurer, that it had the capacity to join with other underwriters to insure very valuable registered mail, and that it specialized in insuring cargo such as gold at the time in question. The court finds that the loss and/or destruction[6] of Marine Insurance Company records from the early 1900s with respect to insuring Canadian Bank of Commerce is not so inconsistent with it's subrogation and other rights associated with the payment of a loss as to constitute an abandonment of those rights for the reason that in 1901 and for many years thereafter (indeed, until the 1980s), recovery of the cargo of the SS Islander was not technically feasible.

(13) Both Theodore Jaynes and Robert Mester learned of the sinking of the SS Islander and its possibly valuable, unrecovered cargo in the mid- 1980s. Mr. Jaynes commenced serious research efforts in 1989, and has carried on those efforts since then. His research efforts have been far more extensive than those of Mr. Mester who, the court finds, has by and large gathered information from other people who were interested in or associated with treasure hunting and remote-controlled deep sea recovery work, as distinguished from doing basic research such as searching out all of the business records, newspaper articles, and other historical records of the loss of the SS Islander.

(14) By 1993, Jaynes had formed Ocean Mar, Inc., and was its principal. In June of 1993, Ocean Mar did a baseline survey of the seabed in the vicinity of the wreck site of the SS Islander.

[6] As Mr. Matthews noted, there were two world wars between 1901 and the 1990s. The court takes judicial notice of the fact that London (where the Marine Insurance Company is located) was subjected to heavy aerial bombing during World War II.

Jaynes and his crew found the bow of the SS Islander in June of 1993. During July and August of 1994, Ocean Mar returned to the site of the sinking of the SS Islander with additional equipment, including high resolution, multi-scan sonar equipment and television equipment.[7] Both of these units provided visual images of the seabed of the wreck site and confirmed the observations by Jaynes in 1993. In 1994, Jaynes identified on the seabed the kind of wooden, steel-banded boxes used by the Canadian Bank of Commerce in shipping gold from Dawson to Vancouver via the SS Islander. Jaynes also observed a partially buried, single gold bar.

(15) In August of 1995, the Marine Insurance Company, the Salvage Association (agent for Marine Insurance), and Ocean Mar, Inc., entered into a salvage contract with respect to the cargo of the SS Islander.[8] The salvage contract is for a term of five years, and is a "no salvage, no pay" contract-- meaning that Ocean Mar is entitled to no compensation if cargo is not recovered, and, if cargo is recovered, the agreement provides for and agreed- upon division of the cargo between Marine Insurance Company and Ocean Mar.

(16) With a salvage contract in hand, Ocean Mar began planning a recovery effort to be undertaken in the summer of 1996.

[7] Because of equipment failure, the television images were not saved on video tape.

[8] It took Jaynes approximately a year (that is, from August of 1994 until August of 1995) to obtain Marine Insurance's concurrence in a salvage contract. The court finds that Marine Insurance thoroughly investigated its situation before entering into the contract with Ocean Mar. Ocean Mar determined to make no further effort at exploration or recovery until a salvage contract was in hand.

Principals of Yukon Recovery learned of Mr. Jaynes' plans for a recovery effort in late 1995 or early 1996. Yukon Recovery was formed in late 1995, and immediately began making inquiries, especially directed at the State of Alaska, with respect to a search effort of its own. In the process, Yukon Recovery came into possession of portions of a funding proposal prepared by former Outside counsel to Ocean Mar, Inc. This information did not materially assist Yukon Recovery in its efforts to locate the SS Islander. However, access to Ocean Mar's proprietary, financial projections undoubtedly added to Yukon Recovery's enthusiasm and sense of urgency with respect to mounting their own, competing effort to locate the remains of the SS Islander.

(17) Yukon Recovery assembled equipment similar to that employed by Ocean Mar. Both companies have access to state-of-the-art, remote-controlled vehicles (submersibles), side-scan sonar, underwater television equipment, robotic arms or manipulators, and the like. As Jaynes had earlier done, Mester and Yukon Recovery rather quickly identified the site of the wreck of the SS Islander[9] in mid-June of 1996. Yukon Recovery raised a whiskey bottle and a brass light fixture from the wreck site.[10] Yukon Recovery did not raise or report seeing any cargo of the SS Islander. With these artifacts, and expecting that Ocean Mar, Inc., would return to the site of the wreckage of the SS

[9] Each of the parties has filed under seal the geographic coordinates for the site which each has located, and the court is satisfied that both parties have identified the same site.

[10] It was conceded that the whiskey bottle was of a 1930 vintage, presumably left by the salvors who had raised the bulk of the SS Islander in 1934. The whiskey bottle is not an artifact of the SS Islander. The light fixture came from the site of the sinking of the SS Islander, but is not otherwise authenticated as an artifact of that vessel.

Islander, Yukon Recovery commenced an in rem proceeding in this court and caused the arrest of the bottle and light fixture by the United States Marshal. Having become aware of this litigation, Ocean Mar, Inc., filed a claim and also commenced separate litigation against the cargo of the SS Islander, Ocean Mar, Inc., seeking a declaration of title and right to possession of the cargo.[11]

(18) Ocean Mar did indeed return to the wreck site in 1996 to undertake salvage operations. Ocean Mar was shortly informed of this court's temporary restraining order of August 2, 1996, which temporarily suspended its operations. In due course, the temporary restraining order was converted to a preliminary injunction[12] which, among other things, permitted both companies (Yukon Recovery and Ocean Mar) to conduct reconnaissance operations so long as they maintained a reasonable distance from and did not interfere with one another. The court precluded any recovery operations by either company in order that the status quo be maintained pending a resolution of the competing claims between the parties which are now before the court. At no time relevant to this case has either Yukon Recovery or Ocean Mar obtained and retained (with or without court approval) actual, continuous, exclusive possession or occupancy of the wreckage site of the SS Islander or the surface of the marine waters of Alaska above it.

[11] Ocean Mar, Inc. v. The Cargo of the SS Islander, Case No. A96-0304-CV (HRH), which case was consolidated with Yukon Recovery's in rem action by order of November 19, 1996. (Clerk's Docket No. 10 in Ocean Mar's case.)

[12] Preliminary Injunction, filed August 14, 1996, Clerk's Docket No. 95.

(19) Both Yukon Recovery and Ocean Mar have entered into contractual arrangements with the State of Alaska with respect to the preservation of artifacts which one or the other might recover.

(20) The court finds that Ocean Mar has or has available to it all of the resources necessary to carry on a well organized, professional, safe, salvage effort with respect to the wreckage of the SS Islander. The court finds that Ocean Mar has sufficient financial resources, and that with these resources there is readily available people with the requisite expertise and equipment to efficiently and safely salvage the cargo which was aboard the remaining submerged section of the SS Islander.

CONCLUSIONS OF LAW

(21) By its in rem complaint[13] against certain abandoned property, Yukon Recovery sought to establish title in its favor with respect to abandoned property on the sea floor which was the remaining wreckage of the SS Islander. Yukon Recovery sought and obtained an order[14] authorizing the issuance of a warrant for the arrest of the abandoned property. The warrant was issued and executed by the United States Marshal upon the whiskey bottle and light fixture which Yukon Recovery returned from the wreckage site. The arrest warrant has never been executed upon any other property.

(22) Ocean Mar claims that it is the duly authorized salvage contractor of Marine Insurance Company and that, as such, it is

[13] Clerk's Docket No. 1.

[14] Clerk's Docket No. 6.

entitled to recover the cargo of the SS Islander in the form of gold bullion now owned by the Marine Insurance Company by reason of subrogation rights.

(23) Whether this court does or does not have admiralty jurisdiction of Yukon Recovery's claim is irrelevant, for the court has concluded that it does have jurisdiction of Ocean Mar's claim to salvage the cargo of the SS Islander as hereinafter set forth. Claims arising out of salvage operations--efforts to rescue or recover ships disabled or abandoned at sea or to retrieve their cargo--are, unquestionably within the admiralty jurisdiction of the federal courts." Treasure Salvors v. Unidentified Wrecked & Abandoned Sailing Vessel, 640 F.2d 560, 566 (5th Cir.1981) (emphasis supplied); 21 U.S.C. § 1333.

(24) Yukon Recovery has not obtained from the court any order granting Yukon Recovery exclusive access to the site in question nor entitling it to any cargo or other wreckage of the SS Islander. On the contrary, the court refused to grant Yukon Recovery exclusive control of the wreckage site, and expressly permitted both Yukon Recovery and Ocean Mar to proceed with exploration and mapping while at the same time maintaining the status quo of the wreckage itself. The court concludes that the arrest of light fixture does not, in and of itself, afford Yukon Recovery any legal status which is entitled to preference or legal priority over a contract salvor of cargo such as Ocean Mar.

(25) In earlier proceedings which are now incorporated herein, the court concluded that the cargo of the SS Islander had not been abandoned.[15] The Canadian Bank of Commerce gold shipment aboard the SS Islander on August 15, 1901, was not

[15] Clerk's Docket No. 151.

abandoned by Marine Insurance Company. The Marine Insurance Company became subrogated to the rights of the Canadian Bank of Commerce and, with respect to the gold shipment in question, has succeeded to ownership of the Canadian Bank of Commerce shipment by reason of having paid the value of it. With its agent, the Salvage Association, Marine Insurance Company has entered into a valid and subsisting salvage contract with Ocean Mar, and Ocean Mar is entitled to go forward with the performance of that contract for the purpose of salvaging from the wreckage of the SS Islander the Canadian Bank of Commerce gold shipment which is now the legal property of Marine Insurance Company subject to Ocean Mar's rights under the salvage contract.

(26) The court concludes as a matter of law that a contract salvor should be preferred over one such as Yukon Recovery which has no rights as regards the wreckage site beyond those associated with the arrest of the light fixture. Ocean Mar, Inc., is entitled to exclusive salvage rights with respect to the wreckage of the SS Islander.

(27) As to property at the site of the wreck of the SS Islander other than that of the successors in interest to the Canadian Bank of Commerce, and subject to the rights of the State of Alaska under its contract with Ocean Mar, Inc., the court concludes that Ocean Mar, Inc., not Yukon Recovery, was the first in modern times to find, observe, and record and make a timely claim for the wreckage of the SS Islander. Although neither Ocean Mar nor Yukon Recovery has reduced such property to possession, it would be unsafe and technically unfeasible for two salvors to work the same wreckage site. It will simply not do as a matter of public policy to permit these competing treasure hunters to risk lives and valuable equipment in actual, on-site competition to

see who will be the first to gain possession of what remains of the SS Islander and her cargo. Such a race for possession would create a grave risk of damage to valuable artifacts, even if both treasure hunters were to undertake the effort safely. Archeological work (and that is an apt description of efforts to raise portions of a 90-year-old wreck) simply cannot be undertaken in the haste which would surely attend the recovery if done under competition. Because Ocean Mar has by far done the more thorough and complete historical investigation, and because it was the first to locate and view the actual debris of the SS Islander, the court concludes that Ocean Mar alone is, by virtue of its discovery, legally entitled to that which it has found, even absent actual possession and even absent actual physical presence on site.

(28) Because it is possible that other claimants will emerge as the wreckage site is developed and cargo raised, and because former Canadian Bank of Commerce gold must be segregated, Ocean Mar must keep detailed records of all property raised at the site. In this regard, and before embarking upon active salvage operations, Ocean Mar shall prepare and submit to the court for its approval a plan for the preparation of an inventory of all items raised from the wreck site of the SS Islander and for the sequestration of all gold recovered at an approved facility within the jurisdiction of the court pending identification of that gold owned by Marine Insurance Company as successor in interest of the Canadian Bank of Commerce, subject of course, to Ocean Mar's contract salvage rights, and resolution of any other claims which may be asserted as regards gold or other artifacts raised from the site of the SS Islander, again subject to this court's determination of Ocean Mar's rights as a general salvor. In addition, this plan shall include Ocean Mar's proposal for how it and the court shall proceed as regards notice to other possible

claimants. The court will retain jurisdiction of this case, even after entry of judgment, for purposes of the resolution of claims as between Ocean Mar as salvor, the Salvage Association as agent for Marine Insurance Company, Ltd., and other claimants and the State of Alaska.

(29) Yukon Recovery's complaint is dismissed with prejudice. The clerk of court shall enter judgment in favor of Ocean Mar, declaring that Marine Insurance Company is the true and lawful owner of Canadian Bank of Commerce Cargo lost in the sinking of the SS Islander, and Ocean Mar is the duly authorized contract salvor of Marine Insurance Company. As such, Ocean Mar has sole and exclusive rights to locate and raise the cargo of the SS Islander, subject to the requirement that a plan for disposition of items recovered be submitted to the court for approval as set forth in Paragraph (28) of the court's findings of fact and conclusions of law. The judgment shall further provide that Yukon Recovery, LLC, its agents, servants, employees, and all others acting in concert with them, are enjoined from taking any further action with respect to exploring or conducting salvage operations at the site of the sinking of the SS Islander, and from interfering in any way with the salvage operations at that site to be undertaken by Ocean Mar. Inc.

The Abandoned Shipwreck Act

43 U.S.C. §§ 2101-2106 (2000)

§ 2101. Findings

The Congress finds that--

(a) States have the responsibility for management of a broad range of living and nonliving resources in State waters and submerged lands; and

(b) included in the range of resources are certain abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention.

§ 2102. Definitions

For purposes of this Act [43 U.S.C. §§ 2101 et seq.]--

(a) the term "embedded" means firmly affixed in the submerged lands or in coralline formations such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, and any part thereof;

(b) the term "National Register" means the National Register of Historic Places maintained by the Secretary of the Interior under section 101 of the National Historic Preservation Act (16 U.S.C. 470a);

(c) the terms "public lands", "Indian lands", and "Indian tribe" have the same meaning given the terms in the Archaeological Resource Protection Act of 1979 (16 U.S.C. 470aa-470ll);

(d) the term "shipwreck" means a vessel or wreck, its cargo, and other contents;

(e) the term "State" means a State of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, American Samoa, and the Northern Mariana Islands; and

(f) the term "submerged lands" means the lands--

(1) that are "lands beneath navigable waters," as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301);

(2) of Puerto Rico, as described in section 8 of the Act of March 2, 1917, as amended (48 U.S.C. 749);

(3) of Guam, the Virgin Islands and American Samoa, as described in section 1 of Public Law 93-435 (48 U.S.C. 1705); and

(4) of the Commonwealth of the Northern Mariana Islands, as described in section 801 of Public Law 94-241 (48 U.S.C. 1681).

§ 2103. Rights of access

(a) Access rights. In order to--

(1) clarify that State waters and shipwrecks offer recreational and educational opportunities to sport divers and other interested groups, as well as irreplaceable State resources for tourism, biological sanctuaries, and historical research; and

(2) provide that reasonable access by the public to such

abandoned shipwrecks be permitted by the State holding title to such shipwrecks pursuant to section 6 of this Act [43 U.S.C. § 2105], it is the declared policy of the Congress that States carry out their responsibilities under this Act [43 U.S.C. §§ 2101 et seq.] to develop appropriate and consistent policies so as to--

(A) protect natural resources and habitat areas;

(B) guarantee recreational exploration of shipwreck sites; and

(C) allow for appropriate public and private sector recovery of shipwrecks consistent with the protection of historical values and environmental integrity of the shipwrecks and the sites.

(b) Parks and protected areas. In managing the resources subject to the provisions of this Act, States are encouraged to create underwater parks or areas to provide additional protection for such resources. Funds available to States from grants from the Historic Preservation Fund shall be available, in accordance with the provisions of title I of the National Historic Preservation Act [16 U.S.C. §§ 470a et seq.], for the study, interpretation, protection, and preservation of historic shipwrecks and properties.

§ 2104. Preparation of guidelines

(a) In order to encourage the development of underwater parks and the administrative cooperation necessary for the comprehensive management of underwater resources related to historic shipwrecks, the Secretary of the Interior, acting through the Director of the National Park Service, shall within

nine months after the date of enactment of this Act [enacted April 28, 1988] prepare and publish guidelines in the Federal Register which shall seek to:

(1) maximize the enhancement of cultural resources;

(2) foster a partnership among sport divers, fishermen, archeologists, salvors, and other interests to manage shipwreck resources of the States and the United States;

(3) facilitate access and utilization by recreational interests;

(4) recognize the interests of individuals and groups engaged in shipwreck discovery and salvage.

(b) Such guidelines shall be developed after consultation with appropriate public and private sector interests (including the Secretary of Commerce, the Advisory Council on Historic Preservation, sport divers, State Historic Preservation Officers, professional dive operators, salvors, archeologists, historic preservationists, and fishermen).

(c) Such guidelines shall be available to assist States and the appropriate Federal agencies in developing legislation and regulations to carry out their responsibilities under this Act [43 U.S.C. §§ 2101 et seq.].

§ 2105. Rights of ownership

(a) United States title. The United States asserts title to any abandoned shipwreck that is--

(1) embedded in submerged lands of a State;

(2) embedded in coralline formations protected by a State on submerged lands of a State; or

(3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register.

(b) Public notice of location. The public shall be given adequate notice of the location of any shipwreck to which title is asserted under this section. The Secretary of the Interior, after consultation with the appropriate State Historic Preservation Officer, shall make a written determination that an abandoned shipwreck meets the criteria for eligibility for inclusion in the National Register of Historic Places under clause (a)(3).

(c) Transfer of title to States. The title of the United States to any abandoned shipwreck asserted under subsection (a) of this section is transferred to the State in or on whose submerged lands the shipwreck is located.

(d) Exception. Any abandoned shipwreck in or on the public lands of the United States is the property of the United States Government. Any abandoned shipwreck in or on any Indian lands is the property of the Indian tribe owning such lands.

(e) Reservation of rights. This section does not affect any right reserved by the United States or by any State (including any right reserved with respect to Indian lands) under--

(1) section 3, 5, or 6 of the Submerged Lands Act (43 U.S.C. 1311, 1313, and 1314); or

(2) section 19 or 20 of the Act of March 3, 1899 (33 U.S.C. 414 and 415).

§ 2106. Relationship to other laws

(a) Law of salvage and the law of finds. The law of salvage and the law of finds shall not apply to abandoned shipwrecks

to which section 6 of this Act [43 U.S.C. § 2105] applies.

(b) Laws of the United States. This Act shall not change the laws of the United States relating to shipwrecks, other than those to which this Act applies.

(c) Effective date. This Act shall not affect any legal proceeding brought prior to the date of enactment of this Act [April 28, 1988].